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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1949

No. 444

CALIFORNIA STATE AUTOMOBILE ASSOCIATION,
Petitioner,

vs.

JAMES G. SMYTH, Collector of Internal Revenue of the First Internal Revenue Collection District of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

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JAMES G. SMYTH, Collector of Internal Revenue of the First Internal Revenue Collection District of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, California State Automobile Association, prays that a writ of certiorari issue to review the

final judgment of the United States Court of Appeals for the Ninth Circuit determining that petitioner was not, during the years 1943 and 1944, a club exempt from income taxation by Section 101(9) of the Internal Revenue Code.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 226) is reported at 175 Fed. (2d) 752. The opinion of the District Court (R. 67) is reported at 77 Fed. Supp. 131.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 22, 1949. (R. 234.) That Court denied petitioner's Petition for Rehearing on August 8, 1949. (R. 235.) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED.

Was petitioner a club organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder (member), and thus entitled to exemption from income and excess profits taxes for the years 1943 and 1944, as well as for future years, under the provisions of Section 101(9) of the Internal Revenue Code.

STATUTES INVOLVED.

Internal Revenue Code, 52 Stat. 480, 481:

"Section 101. *Exemptions From Tax on Corporations.*

"The following organizations shall be exempt from taxation under this chapter:

* * * * * * *

"(9) Clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder."

STATEMENT.

Petitioner is a non-profit, non-stock corporation, organized in 1907 under the laws of the State of California. (R. 67.) From 1913, when the first income tax law was enacted under the 16th Amendment, until 1943, a period of 30 years, petitioner had been exempt from the payment of income and excess profits taxes. (R. 68.) That exemption was finally withdrawn by the Commissioner of Internal Revenue by letter dated July 25, 1945 (Exhibit 1, R. 15-18), in which petitioner was informed it would be "required to file income tax returns and pay any tax shown to be due thereon for each of your taxable years beginning on or after January 1, 1943." This action by the Commissioner was taken in spite of the fact that there had been no change in the law since 1916 except an immaterial change in terminology from "private stockholder or member" to "private shareholder", and no sub-

stantial change in the Regulations except to broaden the terms of exemption in favor of taxpayers. (R. 74.)

Petitioner then filed income and excess profits tax returns, under protest, with respondent for the years 1943 and 1944, and paid the taxes shown thereon, with interest to date of payment. (R. 81.) Thereupon petitioner filed with respondent claims for refund of the amounts so paid and, the Commissioner of Internal Revenue having taken no action either approving or rejecting any of said claims within 6 months from the dates said claims were filed, a suit for refund of the aforesaid amounts of taxes and interest paid was filed in the District Court of the United States for the Northern District of California, under the provisions of Section 3772(a)(2) of the Internal Revenue Code. (R. 2-63, 81-82.) Thereupon respondent filed an answer. (R. 63-67.) The trial was by the Court and judgment was rendered in favor of petitioner against respondent. (R. 79.) An appeal from said judgment was taken by respondent to the Court of Appeals for the Ninth Circuit (R. 91, 92), which reversed the judgment of the District Court. (R. 234.)

The District Court made findings of fact and conclusions of law. (R. 80-89.) It found that the purposes of petitioner have been practically unchanged since its organization, and at all times pertinent were substantially to promote and encourage highway construction, improvement, betterment, maintenance and marking for the guidance and warning of the users, to urge adoption of just and intelligent legislation on the use

of highways and the regulation of traffic thereon, to maintain offices for collecting and disseminating information and the furnishing of advice and assistance to the owners of automobiles, to protect the legitimate interests of its members in connection with its purposes, to affiliate and associate with similar organizations; that none of the foregoing or any other purposes of petitioner were designed or intended to make a profit; that petitioner has no power to distribute or set aside any portion of its net income to its members or to any other person except to carry out its purposes; that in furtherance of the purposes for which it was originally organized as an automobile club, petitioner has provided during the years 1943 and 1944 as well as prior and subsequent to said years, (1) a Touring Bureau which provides the members with complete touring data and assists them in planning motor trips; (2) an Emergency Road Service Department, which makes arrangements for the rendering of emergency road service to members who encounter automobile trouble on the highways, which service is restricted to passenger cars; (3) a Road Sign Department, which operates in conjunction with state and local authorities a service consisting of the erection and maintenance of direction and warning signs and historical markers; (4) a Public Safety Department, which carries on an active aggressive campaign to reduce traffic accidents, eliminate traffic hazards and generally improve traffic conditions; (5) an Adjustment and Traffic Department, which advises and assists the members with respect to traffic viola-

tions and accidents; (6) a License Department, which assists members in the annual renewal of automobile registration with the State Department of Motor Vehicles and obtaining automobile license plates, as well as Federal auto tax stamps; and (7) a Magazine Department which publishes and distributes free to the members a magazine, keeping them informed of motoring conditions and improvements, and specializing in travel information with respect to trips to points of interest where members will find pleasure and recreation, and which has contained no paid advertising material since January 1, 1942; there is no sale or public distribution of said magazine; that the sum total of the activities of the petitioner is designed to alleviate the occasional hardships and inconveniences which are connected with the ownership and operation of pleasure automobiles, and the services rendered by petitioner are for the pleasure and recreation of its members; that, in addition to the normal activities and services of the petitioner during the two years here in question, petitioner engaged in many activities incidental to the war effort and performed many services for the general public, such as road signing as an official agency of the Federal Government in blackout and dimout areas, services in connection with gas rationing, information and advice furnished members of the armed forces, training of drivers for the Red Cross and other volunteer war services, and in arrangements of reservations and accommodations for its members; that none of the normal activities or the wartime activities of the

petitioner were conducted for the purpose of earning a profit or accumulating a surplus, nor was any profit derived from any of these activities; that the petitioner is and was at all times pertinent a club within the meaning of Section 101(9) of the Internal Revenue Code; that petitioner was organized and operated exclusively for pleasure, recreation and other nonprofitable purposes during the years 1943 and 1944, and that no part of its net earnings during said years inured to the benefit of any of its members. (R. 82-89.)

The principal question before the Court of Appeals was whether this petitioner was, during the years 1943 and 1944, a club, organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inured to the benefit of any private shareholder (member). Petitioner timely filed a petition for rehearing in the Court of Appeals, but said petition was denied on August 8, 1949. (R. 235.)

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has never been, but should be, settled by this Court.

The same question of Federal law is presently involved in the cases of a very large number of automobile clubs throughout the United States.

A decision by this Court in this case is required to determine the future, as well as the past, status of petitioner under the aforesaid Section 101(9). Such a decision would presumably likewise set up certain standards by which the tax exemption under the said Section of a large number of other automobile clubs throughout the nation could be determined, thus avoiding a considerable volume of litigation. An important question remains to be determined, one which can be resolved only by this Court, viz., is the nationwide and traditional classification of automobile clubs now to be abrogated?

2. Indicative of the importance of the Federal question involved was the statement of Government Counsel, at the outset of his argument in the Court of Appeals, that this is the Government's test case in obtaining an interpretation of Section 101(9) of the Internal Revenue Code.

3. The Court of Appeals has decided several Federal questions in a way probably in conflict with applicable decisions of this Court.

(a) The Court of Appeals has failed to apply decisions of this Court that where there have been later re-enactments of a section of a tax statute, Congress must be taken to have approved the administrative construction and thereby to have given it the force of law.

Helvering v. Bliss, 293 U.S. 144, 79 L.Ed. 246;
Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 59 S.Ct. 423;

Helvering v. Griffiths, 318 U.S. 371, 63 S.Ct. 636.

(b) The Court of Appeals has failed to give effect to Rule 52(a) of the Rules of Civil Procedure for the District Courts of the United States, providing in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Discussing the principle of the aforesaid rule, long recognized and applied by courts of equity, Mr. Justice Holmes in *Adamson v. Gilliland,* 242 U.S. 350, 353, 37 S.Ct. 169, 170, 61 L.Ed. 356, citing *Davis v. Schwartz,* 155 U.S. 631, 636, 15 S.Ct. 237, 39 L.Ed. 289, said

> "* * * the case is preeminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is testimony consistent with the finding, it must be treated as unassailable."

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the judgment of the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
October 31, 1949.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION (a corporation),
Petitioner.

By ARTHUR H. DEIBERT,
Counsel for Petitioner.

GEORGE E. SANDFORD,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION,
Petitioner,

vs.

JAMES G. SMYTH, Collector of Internal Revenue of the First Internal Revenue Collection District of California,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

OPINIONS OF COURTS BELOW.

The opinion of the Court of Appeals (R. 226) is reported at 175 Fed. (2d) 752. The opinion of the District Court (R. 67) is reported at 77 Fed. Supp. 131.

JURISDICTION.

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition at page 2.

STATEMENT OF THE CASE.

The facts appear in the petition at pages 2 to 6 and in the interest of brevity are not repeated herein.

However, a brief reference to the nature of the controversy is pertinent in presenting the major federal issues raised in the case at bar.

Petitioner is a corporation claiming income tax exemption as a club organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder (member). Exemption is claimed under Section 101(9) of the Internal Revenue Code, 52 Stat. 480, 481.

For a period of thirty years, from 1913 to 1943, petitioner uninterruptedly had been accorded income tax exemption under practically identical provisions of the successive revenue laws, until such exemption was finally withdrawn by the Commissioner of Internal Revenue by letter dated July 25, 1945 (Exhibit 1, R. 15-18), requiring the filing of tax returns and the payment of taxes for taxable years beginning January 1, 1943.

Petitioner prevailed in the Federal District Court but that decision was reversed by the Court of Appeals for the Ninth Circuit.

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

1. In failing to give any effect to decisions of this Court that where there have been later re-enactments of a section of a tax statute, Congress must be taken to have approved the administrative construction and thereby to have given it the force of law.

2. In failing to give any effect to Rule 52(a) of the Rules of Civil Procedure for the District Courts of the United States providing, in part, that findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses.

SUMMARY OF ARGUMENT.

1. This case involves the determination of an important question of Federal law which should be settled by this Court.

2. The administrative construction of a provision of a tax statute acquires the force of law by subsequent re-enactments of such provision by Congress.

3. Under Rule 52(a) of the Rules of Civil Procedure for the District Courts of the United States, findings of the trial Court, so far as there is testimony consistent with the findings, are unassailable.

ARGUMENT.

1. THE CASE INVOLVES THE DETERMINATION OF AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The vital importance to the more than three hundred automobile clubs throughout the United States, including petitioner, of a decision by this Court in this case is emphasized by the statement of Government counsel at the trial of the case in the District Court when he stated, "In connection with the failure of the Commissioner to act promptly after 1941, I take it, is explained by the fact that *this action was a national action taken as to all similar clubs in 1943* and had not been taken as to any of them prior to that time. There is no difference between 1941 and 1943, as far as this club is concerned, or any other club in the United States. That followed G.C.M. 23688 [1943 Cumulative Bulletin 283] which was issued in 1943. In other words, *it was a change at that time of the Department in reference to all clubs*". (Italics supplied.) (R. 106-107.)

The foregoing statement concerning the failure of the Commissioner to act promptly after 1941 relates to the fact that petitioner's general manager, in October, 1941, furnished the Government an affidavit (Exhibit 1-D, R. 112) which contained a statement regarding the activities of petitioner. This statement was requested by respondent on September 10, 1941 (Exhibit 1-C, R. 112), while the final ruling letter of the Commissioner denying petitioner exemption under Section 101(9) of the Internal Revenue Code was not issued until July 27, 1945. (Exhibit 1, R. 15-18.)

The question at issue has never been passed upon by this Court, and in view of the potentially large volume of litigation which otherwise may ensue, it is believed to be not only in the interest of this petitioner but of a very large number of additional automobile clubs throughout the United States to have this question decided by this Court in the present case. In rendering such a decision, it is believed this Court would necessarily set up certain standards which would enable a large number of other automobile clubs throughout the nation to ascertain their own tax status under Section ~~102~~ 101(9), supra, thus avoiding a considerable volume of litigation. At the present time a vital question remains to be authoritatively determined, one which can be resolved only by this Court, viz., is the nationwide and traditional classification of automobile clubs now to be abrogated? In fact, Government counsel in the Court of Appeals prefaced his argument by the statement that this is the Government's test case for the purpose of obtaining an interpretation of Section 101(9) of the Internal Revenue Code.

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2. THE ADMINISTRATIVE CONSTRUCTION OF A PROVISION OF A TAX STATUTE ACQUIRES THE FORCE OF LAW BY SUBSEQUENT REENACTMENTS OF SUCH PROVISION BY CONGRESS.

There has been no change in the tax statute here involved, Section 101(9) of the Internal Revenue Code, since 1916 with the exception of an immaterial change in terminology from "private stockholder or

member", to "private shareholder", the provision in question now reading as follows:

> "Section 101. *Exemptions from Tax on Corporations.*
>
> "The following organizations shall be exempt from taxation under this chapter:
>
> * * * * * * *
>
> "(9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder."

Likewise, there has been no substantial change in the regulations interpreting the foregoing provision from Regulations 33, Article 72, under the Revenue Act of 1916, to the present time, except to expand and broaden the terms of exemption as they appear in present Treasury Regulations 111, Section 29.101(9), in which the following sentence was added to the former regulations: "Generally, an incidental sale of property will not deprive the club of the exemption". (R. 74.)

For a period of thirty years, from 1913 to 1943, the Commissioner of Internal Revenue had exempted petitioner from the payment of any income tax under an administrative construction repeated again and again with no material change in a number of successive regulations issued under various revenue Acts, and finally under the codification of such Acts in the Internal Revenue Code. A number of decisions of this Court have established the rule that such admin-

istrative construction of a provision of a tax statute acquires the force of law by virtue of subsequent re-enactments by Congress of such provision.

This Court in *Helvering v. Bliss,* 293 U. S. 144, 79 L. Ed. 246, stated in connection with the right to a deduction on account of charitable contributions:

> "If the meaning of the Act were doubtful, we should still reach the same conclusion. The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and *are not to be narrowly construed.* * * * Moreover, from 1923 to 1932 the Commissioner uniformly ruled that the deduction for charitable contributions was to be taken from net income before computation of the tax and hence in whole from ordinary net income. *The reenactment in later Acts of the sections permitting the deduction indicates congressional approval of this administrative interpretation.*" (Italics supplied.)

This Court again spoke on this question in *Helvering v. R. J. Reynolds Tobacco Co.,* 306 U.S. 110, 59 S.Ct. 423. In that case the Commissioner's regulations, in effect in 1929, provided that:

> "A corporation realizes no gain or loss from the purchase or sale of its own stock"

and they had so provided since 1920. This Court there said:

> "The administrative construction embodied in the regulation has, since at least 1920, been uniform

with respect to each of the revenue acts from that of 1913 to that of 1932, as evidenced by Treasury rulings and regulations, and decisions of the Board of Tax Appeals. In the meantime, successive revenue Acts have reenacted, without alteration, the definition of gross income as it stood in the Acts of 1913, 1916, and 1918. Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law."

In *Helvering v. Griffiths,* 318 U.S. 371, 396, 63 S.Ct. 636, this Court cited its decision in *Helvering v. Winmill,* 305 U.S. 79, 83, 83 L. Ed. 52, 55, 59 S.Ct. 45, as follows:

"Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received Congressional approval and have the effect of law".

In *Bryant v. Commissioner,* 111 Fed. (2d) 9, the Court of Appeals for the Ninth Circuit, itself said, in a case where an administrative practice by the Bureau of Internal Revenue had continued for more than twenty-two years, although a contrary opinion was later expressed in a memorandum of the General Counsel of that Bureau:

"The established administrative practice of so many years, during which time the exemption was several times reenacted, carries weight as a construction of the statute which is not offset, at least as to the tax year in question, by the later

expression of opinion in G.C.M. 16861, XV-2 Cum. Bull. 179 (1936)." (Italics supplied.)

In *Citizens National Trust & Savings Bank of Los Angeles v. United States,* 135 Fed. (2d) 527 (CCA-9), the bank contended that R. S. 3186 gave the United States a lien only upon property possessed by the taxpayer at the time of the distraint and that the lien did not attach to after-acquired property. The Court of Appeals for the Ninth Circuit held that the statute, by its terms, applied to after-acquired property but went on to say that if the statute was so general in its terms that an administrative interpretation was appropriate, the statute had been interpreted to apply to after-acquired property. Since such interpretation, the section had been amended with no addition of a definite provision as to after-acquired property and presumably with Congressional knowledge of the departmental interpretation. The Court said: "Therefore, such interpretation must be taken as approved by Congress."

The Court of Appeals in the case at bar has failed to give effect to the established rule above discussed.

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3. UNDER RULE 52(a) OF THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, FINDINGS OF THE TRIAL COURT, SO FAR AS THERE IS TESTIMONY CONSISTENT WITH THE FINDINGS, ARE UNASSAILABLE.

There was a considerable volume of testimony presented to the District Court in this case consistent

with the findings of that Court that petitioner was a club (R. 112, 113, 143, 144, 153-155, and 176-182), organized and operated exclusively for pleasure, recreation, and other non-profitable purposes (R. 119-125, 129-133, 146-151, 157-166, 168-171, 182-184, and 189-212), no part of the net earnings of which inures to the benefit of any private shareholder. (R. 173, 174, 184, 186, 187, and 189.)

Consequently, the Court of Appeals erred in failing to adopt and follow the findings of the District Court under the principle enunciated in the foregoing Rule (52(a)). In holding contrary to some of such findings the Court of Appeals has completely ignored the authority of said Rule and, in addition, has given no effect to the phrase in said Section "and other non-profitable purposes", following the words "pleasure, recreation".

In *Wittmayer v. United States,* 118 Fed. (2d) 808, 811, the Court of Appeals for the Ninth Circuit said, in interpreting Rule 52(a), supra, and relying upon several decisions of this Court:

> "The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52(a), 28 U.S.C.A. following Section 723c), is but the formulation of a rule long recognized and applied by courts of equity. *Guilford Const. Co. v. Biggs,* 4 Cir., 102 F. (2d) 46, 47.
>
> "As was said by Mr. Justice Holmes in *Adamson v. Gilliland,* 242 U.S. 350, 353, 37 S.Ct. 169, 170, 61 L. Ed. 356 (citing *Davis Schwartz,* 155 U.S.

631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is preeminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or *so far as there is any testimony consistent with the finding, it must be treated as unassailable.*'" (Italics supplied.)

See also *United States v. Aluminum Co. of America*, 148 F. (2d) 416, 433 (C.C.A. 2nd).

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted and that this Honorable Court should review the decision of the United States Court of Appeals for the Ninth Circuit and finally reverse it.

Dated, San Francisco, California,
October 31, 1949.

ARTHUR H. DEIBERT,
Counsel for Petitioner.

GEORGE E. SANDFORD,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 444

CALIFORNIA STATE AUTOMOBILE ASSOCIATION, A CORPORATION, PETITIONER

v.

JAMES G. SMYTH, COLLECTOR OF INTERNAL REVENUE OF THE FIRST INTERNAL REVENUE COLLECTION DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 67-78) is reported at 77 F. Supp. 131. The opinion of the Court of Appeals (R. 226-234) is reported at 175 F. 2d 752.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1949. (R. 234-235.) A petition

for rehearing was denied on August 8, 1949. (R. 235.) The petition for a writ of certiorari was filed on November 4, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the taxpayer was, during the taxable years 1943 and 1944, a club organized and operated exclusively for pleasure, recreation and other nonprofitable purposes within the meaning of Section 101 (9) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 101. EXEMPTIONS FROM TAX ON CORPORATIONS.
>
> The following organizations shall be exempt from taxation under this chapter—
>
> * * * * *
>
> (9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder;
>
> * * * * *
>
> (26 U. S. C. 1946 ed., Sec. 101.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> Sec. 29.101(9)-1. *Social clubs.* The exemption granted by section 101(9) applies to prac-

tically all social and recreation clubs which are supported by membership fees, dues, and assessments. If a club engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, or social purposes. Generally, an incidental sale of property will not deprive the club of the exemption.

STATEMENT

Taxpayer was organized under the laws of California in 1907 as a nonprofit corporation, the purposes of which the District Court found to be as follows (R. 82):

> (1) To promote and encourage highway construction, improvement, betterment, maintenance and marking for the guidance and warning of the users.
>
> (2) To urge adoption of just and intelligent legislation on the use of highways and the regulation of traffic thereon.
>
> (3) To maintain offices for collecting and disseminating information and the furnishing of advice and assistance to the owners of automobiles.
>
> (4) To protect the legitimate interests of its members in connection with its purposes.
>
> (5) To affiliate and associate with similar organizations.

The District Court also found (R. 83-84) that taxpayer, in furtherance of its purposes, "provided" during 1943 and 1944 the following:

> (1) A Touring Bureau which provides the members with complete touring data and assists them in planning motor trips.
>
> (2) An Emergency Road Service Department, which makes arrangements for the rendering of emergency road service to members who encounter automobile trouble on the highways, which service is restricted to passenger cars.
>
> (3) A Road Sign Department, which operates in conjunction with state and local authorities, a service consisting of the erection and maintenance of direction and warning signs and historical markers.
>
> (4) A Public Safety Department, which carries on an active and aggressive campaign to reduce traffic accidents, eliminate traffic hazards and generally improve traffic conditions.
>
> (5) An Adjustment and Traffic Department, which advises and assists the members with respect to traffic violations and accidents.
>
> (6) A License Department, which assists members in the annual renewal of automobile registration with the State Department of Motor Vehicles and obtaining automobile license plates, as well as Federal auto tax stamps.

(7) A Magazine Department which publishes and distributes free to the members a magazine, keeping them informed of motoring conditions and improvements, and specializing in travel information with respect to trips to points of interest where members will find pleasure and recreation, and which has contained no paid advertising material since January 1, 1942.

The Articles of incorporation as amended in 1929 provide in the third paragraph of Article II as follows (R. 227-228):

> That the purposes for which said corporation is formed are: . . .
>
> To furnish advice, information and assistance of all kinds to owners and operators of self-propelled vehicles of all kinds operated on land or sea or in the air and to establish and maintain offices, agencies and bureaus in said State and elsewhere for the purpose of collecting and disseminating such information and rendering such service . . .

Articles II and III of the by-laws are as follows (R. 228):

Article II

Purposes and Powers

> Section 1. The purposes and powers of this Association shall be those which are set forth in the Articles of Incorporation as now existing or as the same may be hereafter amended.

Article III

Membership

Section 1. All persons interested in the objects of this Association as hereinabove set forth shall be eligible to membership.

Section 2. Similar Associations interested in the objects of this Association shall be eligible to membership.

Among the services rendered by taxpayer to its members, according to the testimony of taxpayer's officers, were tow service, emergency road service, map service, bail bond service, touring service, claim adjustment service, license service, and also a limited personal accident service insurance policy. (R. 144.) An additional privilege of membership was the right to obtain automobile insurance at cost. (R. 126-127, 140-141.)

The District Court concluded (R. 87) that the "association is and was at all times here pertinent a club within the meaning of Section 101 (9) of the Internal Revenue Code" and that taxpayer (R. 89) "was organized and operated exclusively for pleasure, recreation and other nonprofitable purposes during the years 1943 and 1944". The judgment was reversed by the Court of Appeals. (R. 235.)

ARGUMENT

In denying taxpayer a tax exempt status under Section 101 (9) of the Code, *supra*, the Court of

Appeals reached the only conclusion compatible with the language of the statute;[1] and since the decision involves no conflict with any other case the petition for certiorari should be denied.

Section 101 (9) of the Code grants tax exempt status to—

> Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder;
>
> * * * * *

The undisputed facts disclose that taxpayer is not a "club" as that term is used in the statute, and that it was neither organized nor operated exclusively for pleasure and recreation.[2] That the

---

[1] The Tax Court has reached the same conclusion as to organizations similar to the petitioner in *Keystone Automobile Club* v. *Commissioner*, 12 T. C. 1038, pending on appeal in the Court of Appeals for the Third Circuit, and in *Chattanooga Automobile Club* v. *Commissioner*, 12 T. C. 967, pending on appeal in the Sixth Circuit.

[2] On the familiar doctrine of *ejusdem generis* the test of exemption is whether a club is organized and operated exclusively for pleasure, recreation and other *similar* nonprofitable purposes. Any other interpretation would render meaningless the word "exclusively" preceding "pleasure, recreation". See *Better Business Bureau* v. *United States*, 326 U. S. 279, 283. An analysis of all the subsections of Section 101 demonstrates that only those nonprofit organizations which meet the functional requirements enunciated were intended to be tax exempt. Finally the Regulations dealing with Section 101 (9) (Appendix, *infra*), which have been in effect since 1916, are all entitled "Social clubs" and all contain the following or similar phrase: "The exemption granted by section 101 (9) applies to all social and recreation clubs * * *".

taxpayer is not a club is manifested by the facts that there was no provision made for social intercourse; that there was no real commingling of the bulk of the membership; that the membership was substantially unlimited; and there were no club activities. (R. 133, 135-137.) In essence taxpayer is a service association organized and operated to render services to its members for a fee and to obtain such other objectives as the betterment of highway construction and the promotion of safe driving. It is patent that when, for the payment of $12, the so-called "member" secured the right to tow service, emergency road service, bail bond service, claim adjustment service, plus a personal accident policy, and the privilege of purchasing automobile insurance at cost, the "member" was not joining a club but was purchasing services. (R. 126-127, 140-141, 144.)

Moreover, taxpayer is neither organized nor operated exclusively for pleasure and recreation. As the Court of Appeals observed (R. 227-228), the articles of incorporation as amended provide *inter alia* that the purpose of the organization is to furnish advice, information and assistance to owners and operators of *"self-propelled vehicles of all kinds"*, and the by-laws provide for membership of all persons interested in the organization's objectives, which would include owners and operators of commercial vehicles. While it is true that owners of trucks and purely commercial vehicles were

not in fact admitted to membership, all owners of passenger cars driven by capable drivers were admitted. Since no argument is required to demonstrate that the passenger car is itself commonly utilized by commercial agents and is regularly employed in the conduct of ordinary daily business, it is thus apparent that taxpayer is not operated exclusively for pleasure and recreation. Indeed, during the taxable years much of taxpayer's activity was concerned with the war effort. (R. 121-123.) Consequently taxpayer can meet none of the tests enunciated by the statute for exempt status.

Taxpayer's suggestion (Pet. 9) that the Court of Appeals failed to give effect to Rule 52(a) of the Rules of Civil Procedure is without merit. No bona fide dispute exists as to the nature of the California State Automobile Association or its activities; nor was the credibility of witnesses in any way involved. The question presented to the Court of Appeals was one of statutory construction; and the court interpreted the statute correctly. It is in any case clear that the District Court committed error in holding that the taxpayer was a "club[s] organized and operated exclusively for pleasure, recreation and other nonprofitable purposes" within the meaning of Section 101 (9).

Similarly without merit is taxpayer's contention that the Court of Appeals was bound to give effect to early informal administrative rulings. Such

rulings lack the dignity and effect of Treasury Regulations; are binding on neither the Commissioner nor the taxpayers; and, being principally of individual application, do not, when followed by reenactment of the statute, imply Congressional acquiescence. *Helvering* v. *N. Y. Trust Co.,* 292 U. S. 455; *Biddle* v. *Commissioner,* 302 U. S. 573; *Higgins* v. *Commissioner,* 312 U. S. 212. Moreover in 1943, the earlier rulings here relied upon by taxpayer were thoroughly reviewed and it was concluded that organizations such as the taxpayer are not entitled to exempt status under Section 101 (9). G.C.M. 23688, 1943 Cum. Bull. 283[3] (Appendix, *infra*). Finally, the Regulations, while they do not deal specifically with automobile associations, fully support the Collector's position here.[4]

---

[3] This ruling is characterized by Mertens as "an extended and well considered opinion". 6 Mertens, Law of Federal Income Taxation, Sec. 34.30, p. 63.

[4] See fn. 2.

CONCLUSION

The decision of the Court of Appeals is correct, turns on the particular facts of the case and is not in conflict with any other decision. The petition should therefore be denied.

Respectfully submitted,

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DECEMBER, 1949.

APPENDIX

Treasury Regulations 33 (Revised), promulgated under the Act of September 8, 1916, as amended by the Act of October 3, 1917:

> Art. 72. *Social clubs.*—Social clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes are exempt from tax, provided no part of any net income which they receive inures to the benefit of any private stockholder or individual. This exemption will reach practically all social and recreation clubs which are supported by membership fees, dues, and assessments.
>
> If a club, by reason of the comprehensive powers granted in its charter, engages in traffic, in agriculture, or horticulture, in the sale of real estate, timber, etc., for profit, it will be held that such club is not organized and operated exclusively for pleasure, recreation, or social purposes. It thus becomes a business or commercial enterprise, and any profit realized from such activities is subject to the tax imposed by this title, and the club so operated must make returns of annual net income.

Treasury Regulations 45, promulgated under the Revenue Act of 1918:

> Art. 520. *Social clubs.*—The exemption applies to practically all social and recreation clubs which are supported by membership fees, dues and assessments. If a club, by reason of the comprehensive powers granted in its charter, engages in traffic, in agriculture

or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation or social purposes, and any profit realized from such activities is subject to tax.

Article 520 of Treasury Regulations 62, promulgated under the Revenue Act of 1921, is the same as the same numbered Article of Regulations 45.

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

> Art. 520. *Social clubs.* — The exemption granted by paragraph (9) of section 231 applies to practically all social and recreation clubs which are supported by membership fees, dues, and assessments. If a club, by reason of the comprehensive powers granted in its charter, engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, or social purposes, and any profit realized from such activities is subject to tax.

Article 520 of Treasury Regulations 69, promulgated under the Revenue Act of 1926, is the same as the same numbered Article of Regulations 65.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> Art. 530. *Social clubs.* — The exemption granted by section 103 (9) applies to practically all social and recreation clubs which are supported by membership fees, dues, and as-

sessments. If a club, by reason of the comprehensive powers granted in its charter, engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, or social purposes, and any profit realized from such activities is subject to tax.

Article 530 of Treasury Regulations 77, promulgated under the Revenue Act of 1932, is the same as the same numbered Article of Regulations 74.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

> Art. 101(9)-1. *Social clubs.*—The exemption granted by section 101 (9) applies to practically all social and recreation clubs which are supported by membership fees, dues, and assessments. If a club, by reason of the comprehensive powers granted in its charter, engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, or social purposes, and any profit realized from such activities is subject to tax. If a club, otherwise exempt, sells any of its property at a profit, it is not exempt for the taxable year for which the profit is taxable.

Article 101(9)-1 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, is the same as the same numbered Article of Regulations 86.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

> Art. 101(9)-1. *Social clubs.*—The exemption granted by section 101(9) applies to practically all social and recreation clubs which are supported by membership fees, dues, and assessments. If a club engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, or social purposes. Generally, an incidental sale of property will not deprive the club of the exemption.

Sections 19.101(9)-1 of Treasury Regulations 103 and 29.101(9)-1 of Regulations 111, promulgated under the Internal Revenue Code, are the same as Article 101(9)-1 of Regulations 101.

G. C. M. 23688, 1943 Cum. Bull. 283:

* * * * *

> (b) Even if the individuals who are members of "clubs" or "divisions" were also members of the association, it is believed that the organization would not qualify as a "club" within the meaning of the statute. Although there is no statutory definition of the term "club," as used in section 101(9) of the Code, it is believed that the term contemplates a comingling of members, one with the other, in fellowship. Thus, an organization should be so composed and its activities be such that fellowship among the members plays a material part in the life of the organization in order

for it to come within the meaning of the term "club." Social activities among the members of the component parts of the instant organization are confined to small, random groups. No material group activity of any kind is carried on or sponsored by the association or any of its component parts, and it does not appear that there are any facilities for personal contacts among the members. It is represented that the "club" or "division" headquarters may be considered the "clubhouse" of each individual. While a clubhouse is not considered essential to the existence of a club, it does not appear that the headquarters, where practically the only activity is that of keeping records and dispensing personal information, would constitute a clubhouse in any real sense of the word. As the principal activity of the organization, with respect to the members of its component parts, is that of rendering personalized services in connection with the use of their automobiles, in the receipt of which each individual participates without contact with, or regard for, any other member, it does not appear that fellowship constitutes a material part of the life of the organization. It it to be noted, however, that fellowship need not be present between each member and every other member of a club, if it constitutes a material part of the life of the organization. In this respect, it is believed that a State-wide or Nation-wide organization, which is made up of individuals, but is broken up into local groups, satisfies this requirement if fellowship

constitutes a material part of the life of each local group.

The term "clubs," as used in section 101(9) of the Code, supra, is used in the same sense as the term "club" is used in section 1710 of the Code and corresponding sections of the Revenue Acts relating to the taxation of dues or membership fees paid to "any social, athletic, or sporting club or organization." (See G.C.M. 13067, supra.)

In *Arner* v. *Rogan* (May 20, 1940, unreported), the District Court of the United States for the Southern District of California, Central Division, had occasion to consider whether the Biltmore Health Club was a "club" within the meaning of section 501 of the Revenue Act of 1926, as amended by section 413(a) of the Revenue Act of 1928 (now section 1710 of the Code). In concluding that the organization was not a club, the court said:

> * * * at least there must be some sort of association or cooperation between the members in an effort to reach some common objective before we may consider that there is a club or organization.

In the course of its opinion, the court observed:

> The evidence shows that members never met together or in committee and never participated in any activities which are normally carried on by members of clubs or similar organizations, nor is there evidence that the patrons were entitled by the terms of their contracts to so participate. * * *

Another factor given weight by the court was that:

> * * * the Biltmore Health Club did not in practice restrict its membership, nor did it agree to do so. The only qualifications apparently were that the applicant be over 21, white, free from any contagious disease or dangerous physical condition, and able to pay the fees.

The necessary implication to be derived from the Arner case is that financial contribution by way of a fee charged by the organization does not amount to "association or cooperation between the members in an effort to reach some common objective," but that there must be some participation by the members in activities ordinarily carried on by clubs, which activities are intended to culminate in the realization of a common objective.

The evidence in the instant case does not indicate that members of the M Association participate in activities normally carried on by members of a club. Generally, the activities of the association may be classed in two groups, namely, those relating to the promotion of highway and motoring improvements and those relating to the services offered to individuals. In so far as the promotion of highway and motoring improvements is concerned, it does not appear that any substantial part of the local membership of the organization participates in such activities. Individual members, as such, have no right to vote or participate in the affairs of the corporation. The by-laws restrict voting rights to member organizations. In so far as services to individuals are concerned, members participate

only to the extent of receiving such services. Although it might be contended that the receiving of services constitutes a common objective of the local members, it can not be said that members participate in activities leading to the rendition of such services, except to the extent that they make a financial contribution by way of a fee charged by the local organization. The principal activity of the M Association with respect to individuals, as stated above, is that of rendering services to motorists. Printed matter used in the solicitation of new members emphasizes the protection, service, and savings that accrue to members. It is reasonable to presume, then, that the actuating motive of individuals in joining the organization is to secure the convenience and savings afforded by services offered by the organization, and not to participate in any common objective proposed by the executives of the organization.

Although it should not be taken as the sole criterion, it is to be noted that no limitations are placed on membership by individuals. Organization members are limited to the extent that two franchises will not be given for the same territory. As to individuals, the organization is open to anyone who has not been convicted of manslaughter, negligent homicide, or hit-and-run or drunken driving, and who can pay the annual fee.

Upon reconsideration of the issue on the basis of the facts now presented, it is the opinion of this office that the M Association is not a "club," within the meaning of section 101(9) of the Internal Revenue Code and corresponding provisions of prior Revenue Acts.

Even though the association qualified as a "club" within the meaning of the statutes, it is not believed that it would be entitled to exemption as a club "organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes."

It is well recognized that exemption provisions, such as section 101(9) of the Code, supra, are to be strictly construed. In *Chicago Theological Seminary* v. *Illinois* (188 U.S. 662), the Supreme Court of the United States stated in part as follows:

> The rule is that, in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it can not exist by implication only; a doubt is fatal to the claim.

Under the rule of *noscitur a sociis,* the test of exemption is whether a club is organized and operated exclusively for pleasure, recreation, and other *similar* nonprofitable purposes. It appears, then, that section 101 (9) of the Code, supra, contemplates a club which devotes itself *exclusively* to activities in the nature of pleasure and/or recreation.

The principal activity of the M Association is that of rendering services to members in connection with the repair, maintenance, and use of their automobiles. In such respect, the organization operates in the nature of a nonprofit cooperative buying association. From the standpoint of the pleasure and recreation to be derived from the use of an automobile, most of the services offered are of the type available to motorists generally on a com-

mercial scale at greater cost. Upon the payment of an annual fee, a member becomes entitled to free emergency road services which include such things as 30-minute road repairs, towage, tire changing, and gasoline delivery. In addition thereto, free services include brake and headlight adjustments, protection from car theft, and bail bond service. Insurance coverage is furnished at reduced premium costs, and members are able to make certain purchases at less than market price. In view of the above, it appears that the association operates to a material extent as a service club and is not engaged *exclusively* in activities in the nature of pleasure and/or recreation within the meaning of the statute.

It is not believed that section 101(9) of the Code, supra, was intended to exclude from Federal income taxation a club wherein the principal activity is that of rendering services of a commercial nature to members at a lower cost than would be paid elsewhere, even though the club derives no profits from such activity.

In view of the foregoing discussion and conclusions, G.C.M. 3555, supra, and G.C.M. 2867 (C.B. VII-1, 115 (1928)) are revoked, and it is recommended that O.D. 643 (C.B. 3, 241 (1920)) be revoked and that I.T. 2106 (C.B. III-2, 228 (1924)) be modified to conform to the views expressed in this opinion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 444.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION,

Petitioner,

vs.

JAMES G. SMYTH, COLLECTOR OF INTERNAL REVENUE OF THE FIRST INTERNAL REVENUE COLLECTION DISTRICT OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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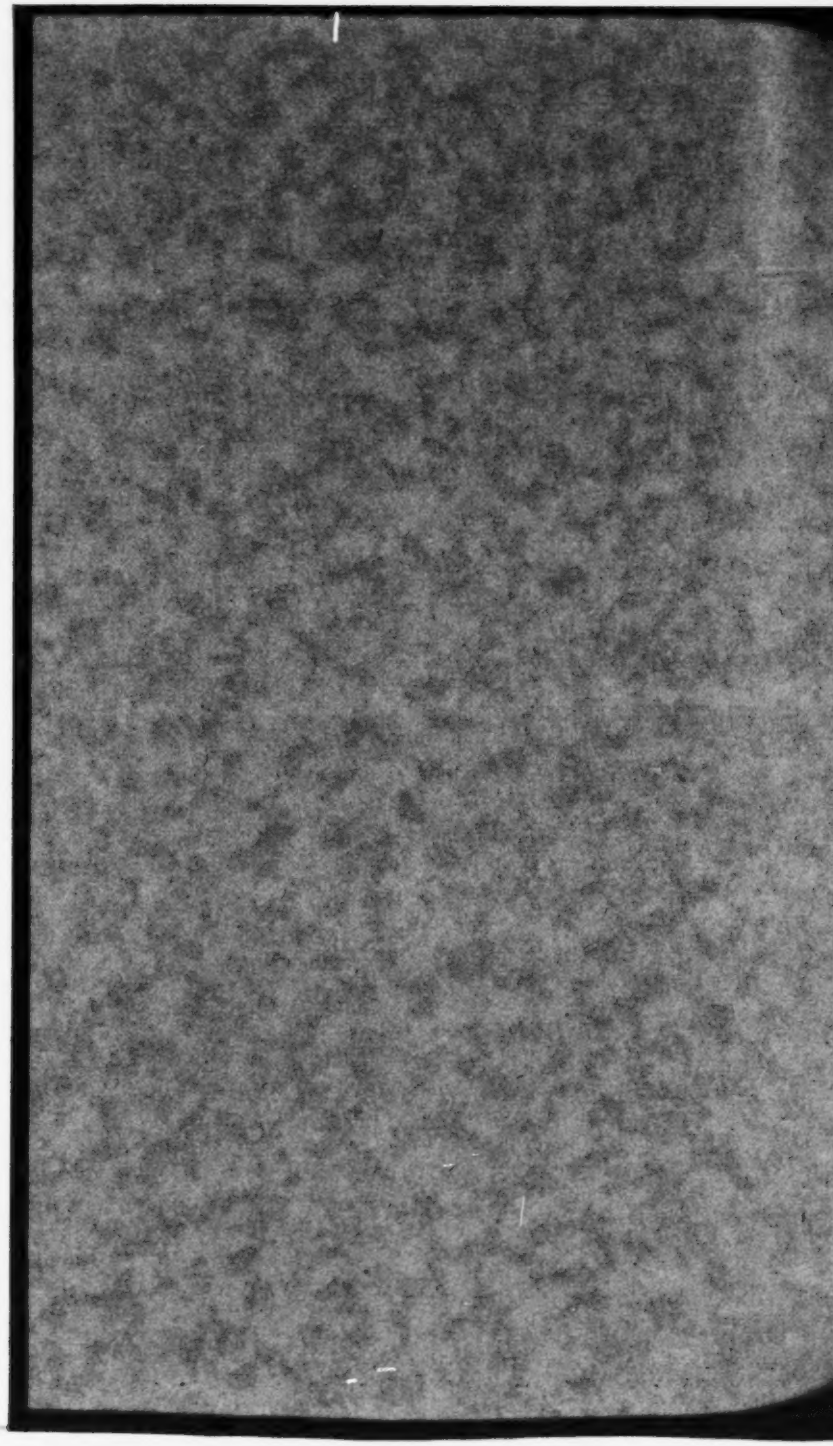

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PETITIONER'S REPLY BRIEF.

Argument.

It is desired first to correct several patent errors which appear in Respondent's brief. On page 6 thereof, Respondent states that "An additional privilege of membership was the right to obtain automobile insurance at cost," and the same statement is made in the first paragraph on page 8 of said brief. These statements are subject to the qualification that not all members of Petitioner are entitled to obtain automobile insurance at cost, so that such "right" was not absolute, and further that such insurance was not furnished by Petitioner at all but by the Inter-Insurance Bureau, which is not a part of Petitioner but a separate and distinct corporation. [R. 126-127, 140-141.]

Also on page 8 of Respondent's brief, it is stated that "There were no club activities." Such statement is quite contrary to the fully established facts, based upon the uncontradicted testimony of witnesses, and set forth in the District Court's Findings of Fact, paragraph XVII of which states, so far as pertinent:

> "That Plaintiff has annual meetings of its members, meetings of its board of directors, and other meetings occasionally called by the Plaintiff and its standing committees, which meetings members are entitled to attend." [R. 86.]

Petitioner has a board of directors of 21 members and 10 standing committees, each of the latter consisting of 5 members. [R. 176-181.]

In Note 1 on page 7 of Respondent's brief, reference is made to the cases of two other organizations similar to the Petitioner, viz., *Chattanooga Automobile Club v. Commissioner,* 12 T. C. 967, and *Keystone Automobile Club v. Commissioner,* 12 T. C. 1038, both of which cases are now pending on appeal in the Court of Appeals for the Sixth Circuit and the Third Circuit, respectively.

It will be noted that in the *Chattanooga* case, the first of such cases to be decided by the Tax Court of the United States, there were dissents by four Judges and two separate, lengthy and strongly dissenting opinions. In fact, the two dissenting opinions are far more analytical than the majority opinion. The latter is quite brief and begins with the statement:

> "The Commissioner has provided in his regulations for many years that an organization will not be deemed exempt if it engages in traffic for profit, Regulation 33, Article 72 to Regulation 111, Section

29.101(9)-1, although a profit from an activity merely incidental to its primary purpose might not render it subject to tax."

From the above quotation it would seem the Tax Court considered that the Chattanooga Automobile Club was engaged in traffic for profit. Reference to "traffic for profit" was taken from the Treasury Regulations which have been quoted by Respondent in its brief on pages 12 to 15 thereof. The language from Article 101(9)-1, Treasury Regulations 101, upon that point read:

> "If a club engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, or social purposes."

There was nothing in the Findings of Fact of the Tax Court in the *Chattanooga* case to indicate that Club was engaged in traffic for profit. Likewise, such a purpose or such an activity is not found among those of Petitioner in the instant case. It seems clear that "engaging in traffic for profit" means the carrying on of a commercial transportation enterprise, and that such an activity was entirely foreign to both the Chattanooga Automobile Club and to this Petitioner. Reference is made in this connection to the District Court's Finding No. XII in the instant case:

> "That none of the normal activities or the war-time activities of the Plaintiff were conducted for the purpose of earning a profit or accumulating a surplus, nor was any profit derived from any of these activities [R. 84-85]."

It is believed that the following statement in the dissenting opinion of Judge Harlan in the *Chattanooga* case is not only true, but that it goes to the heart of one of the misconceptions on the part of the Court of Appeals for the Ninth Circuit in the present case:

> "While the activities of local automobile clubs have changed somewhat in detail with the growth in automobile traffic, the purposes of those activities have remained constant."

The historical background of Section 101(9) of the Code, as well as the Commissioner's attitude toward that and prior practically identical exempting provisions of the tax laws, is accurately stated in the dissenting opinion (joined in by three other Judges) of Judge LeMire in the *Chattanooga* case:

> "Substantially the same provisions as those contained in section 101(9), above, have appeared in every revenue act since the Act of 1913. Section 11(a) Ninth of the 1916 Act, for instance, exempted any 'Club organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net income of which inures to the benefit of any private stockholder or member.' From its inception, the Commisisioner construed the section as granting exemption to automobile clubs such as the petitioner. It was not until 1943 that he reversed his position, ruling in *G. C. M. 23688,* 1943 C. B., p. 283, that an association functioning as a federation of automobile clubs was not a club within the meaning of section 101(9), Internal Revenue Code, and was not organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes within the meaning of that section."

The later statement of Judge LeMire in the same case is quite pertinent:

"Undoubtedly, there are many organizations like the petitioner which, in reliance upon the contemporaneous administrative construction of the statute, have adopted forms of organization and policies carefully designed to preserve their tax exempt status. I do not think that they should now be held taxable under a changed construction of the statute which is at best doubtful. The Supreme Court spoke out in strong disapproval of such a course in *Helvering v. Griffiths,* 318 U. S. 371 [43-1 U. S. T. C., §9319], a case involving the taxability of stock dividends. The Court said:

" 'We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the Congressional proceedings and debates, his understanding of nontaxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations of the Treasury to advise that no such liability existed. It would be a pity if taxpayers could not rely on this concurrent assurance from all three branches of the Government. But we are asked to brush all this aside and simply to decree that these transactions are taxable anyway.' "

The decision of the Tax Court in *Keystone Automobile Club v. Commissioner, supra,* cited in Respondent's brief, merely follows the decision in the *Chattanooga Automobile Club* case, *supra,* which is stated to be controlling. It is interesting to note that the opinion in the *Keystone* case was written by Judge Opper, who agreed with both of the dissenting opinions in the *Chattanooga* case.

Note 2 on page 7 of Respondent's brief makes brief reference to the doctrine of *ejusdem generis* and interpolates the word "similar" in Section 101(9) of the Internal Revenue Code before the words "non-profitable purposes."

This Court had occasion to consider the rule of *ejusdem generis* and the limitations thereon in *Helvering, Commissioner of Internal Revenue, v. Stockholms Enskilda Bank,* 293 U. S. 84, 79 L. Ed. 211, where it said:

> "But it is said that the phrase in question must be restricted in accordance with the rule of *ejusdem generis.* The point is not without merit. The phrase reads 'interest on bonds, notes, or other interest-bearing obligations.' If the rule invoked be held controlling, it would follow that the general words 'other interest-bearing obligations' must be assimilated to the particular words 'notes and bonds,' and restricted to obligations of the same kind. But while the rule is a well-established and useful one, it is like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive. To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate canons of statutory construction, of which the rule of *ejusdem generis* is only one. If, upon a consideration of the context and the objects sought to be attained and of the act as a

whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the legislature shall not fail."

In *State of Texas et al. v. United States et al.,* 6 Fed. Supp. 63, page 65, the Court said:

> "First of all, the rule *ejusdem generis* is a rule of construction only 'to be used as an aid in the ascertainment of the intention of the lawmakers, and not for the purpose of subverting such intention when ascertained.' *Mid-Northern Oil Co. v. Walker,* 268 U. S. 45, 49, 45 S. Ct. 440, 441, 69 L. Ed. 841."

Additionally, it might be observed that the phrase "pleasure and recreation" in Section 101(9) of the Code is clear and unambiguous, and it is difficult to conceive of additional "non-profitable purposes" so like pleasure and recreation as to require the application of the doctrine of *ejusdem generis.* On the contrary, we believe that "other non-profitable purposes" in Section 101(9) was clearly intended to enlarge the field of purposes which would still entitle a club to exemption, even though not found within the well understood meaning of "pleasure and recreation * * * purposes," and that the war-time services rendered without profit by Petitioner should be held to fall within the category of "other non-profitable purposes," particularly since they precisely fit that description. Otherwise it would seem that the interpolation of the word "similar," as suggested by Respondent, could be used to defeat the exemption of every other type of non-profit or charitable corporation which engaged in volunteer war work.

Further, we believe it is hardly open to question that the emergencies created by the late war forced changes in the operations of numerous corporations and other organizations throughout the country, as, for example, where labor and materials were scarce or, at times, practically unobtainable, and that the rendition of patriotic services, either voluntarily or because of changed conditions over which such organizations had no control, should not be used to impair or defeat rights otherwise available to them under the law.

Respondent makes reference to the fact that the Treasury Regulations dealing with Section 101(9) are entitled "Social Clubs" and that all contain the following or similar phrase: "The exemption granted by Section 101(9) applies to all social and recreation clubs * * *." We believe it only fair to complete Respondent's quotation from the Regulations by adding after the word "clubs" the following phrase which there appears: "which are supported by membership fees, dues, and assessments." Petitioner is supported by membership fees and dues. [Finding of Fact XV, R. 85.] It is interesting to note, also, that the same Treasury Regulations (Resp. Br. p. 15) state further that "If a club engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, *or* social purposes. * * *" (Italics supplied.) The Regulations themselves thus recognize that there are clubs entitled to the exemption granted by Section 101(9) of the Code which are organized and operated exclusively for pleasure and recreation *as distinguished from* social purposes. The fact that the Treasury Regulations, *supra,* under Section 101(9)

are headed "Social Clubs" does not, therefore, indicate that exempt clubs were limited to social clubs, and it seems obvious that the heading was adopted merely for the purpose of brevity and because there were a great many clubs with social features, such as country clubs, which were granted exemption. The very use of the disjunctive in the Regulations, *supra,* makes it abundantly clear that exemption was not to be confined to "social clubs" alone.

Respondent asserts that Petitioner is not a club because there was no provision made for social intercourse and there was no real commingling of the bulk of the membership.

So far as Petitioner meeting the definition of "club" is concerned, there are numerous definitions of the term, all of them indicating clearly that Petitioner qualifies for such classification. The New International Encyclopedia, Volume 5, pages 487 *et seq.,* defines the word "club" as follows:

> "A word said to be derived from the Saxon cleofan, to divide—a club being an association the expenses of which are shared among the members."
>
> *"The Automobile Club of America,* devoted to the advancement and regulation of motoring was established in 1890 and has 1,660 members. *The Aero Club of America,* founded in 1906 for the promotion of aernoautics, now has 340 members." (Italics supplied.)

Webster's New International Dictionary sets forth, among other definitions of the word "club," the following:

> "To unite for a common end, or contribute to a common stock; as to club exertions. * * *"
>
> "Intransitive—To form a club; to combine for the promotion of some common object; to unite."

In the above definitions of the term club, and in other definitions, no reference is made to the necessity for social intercourse or commingling of the bulk of the membership to qualify as a club.

On page 8 of his brief, Respondent refers to "the so-called 'member'," and asserts that "the 'member' was not joining a club but was purchasing services."

The Record is replete with references to members and membership in Petitioner Association, and "Membership" is specifically dealt with in Article III of Petitioner's Articles of Incorporation quoted on page 6 of Respondent's brief. The initiation fees of new members and the annual dues of members, together with membership qualifications, are referred to in the testimony of Petitioner's witnesses as, for instance, at R. 134 and 135.

Respondent asserts Petitioner is neither organized nor operated exclusively for pleasure and recreation. In reply, it may be stated that there is a large number of cases in which the form of organization of a corporation, the statutes under which it was organized, and powers outlined in the charter, have been held not decisive of the question as to whether it was actually "organized" for such purposes.

In *Commissioner v. Battle Creek, Inc.*, 26 F. 2d 405, the corporation was organized under the general corporation laws and was authorized to conduct "any lawful business." The corporation was not denied exemption simply because it was so organized. The Court said:

> "It is not unusual for charters of corporations to grant broad powers and privileges that are never intended to be used."

It is believed the Court will take judicial notice of the fact that many corporations are so organized.

See also:

Koon Kreek Klub v. Thomas, 108 F. 2d 616;

Anderson Country Club v. Commissioner, 2 T. C. 1238;

Sands Springs Home, 6 B. T. A. 198;

Roche's Beach, Inc. v. Commissioner, 96 F. 2d 776;

Unity School of Christianity v. Commissioner, 4 B. T. A. 61;

Goldsby King Memorial Hospital, 3 T. C. M. 693;

I. T. 1914, III-1, Cumulative Bulletin, Bureau of Internal Revenue, 287;

I. T. 2325, V-2 C. B. 63;

A. R. R. 218, III C. B. 238.

Both the Court of Appeals for the Ninth Circuit and Respondent refer to the use of passenger cars by commercial agents and the employment of such cars in the conduct of daily business, asserting that Petitioner's facilities were, therefore, used to some extent for purposes other than pleasure and recreation. It is respectfully urged that this is not the proper criterion by which to decide the question of Petitioner's exemption under Section 101(9) of the Code, since the purpose of Petitioner is not to be determined by the use to which its facilities may sometimes be put by its members. It would be entirely erroneous, we believe, to deny tax exemption to a luncheon club or a golf club simply because some of the members of such clubs use the club facilities as a means of making and continuing business and professional contacts which are

intended to and actually do serve the business and professional, rather than the pleasure and recreation, interests of such members. Such a practice has, for many years, been so widespread and so well known that it is believed the Court will judicially notice the practice. In fact, in some cases the making of business contacts or furthering business or professional interests is the sole or practically the sole reason for taking out such memberships, and in *Johnson v. United States,* 45 Fed. Supp. 377, dues paid to two country clubs were held to be deductible as business expenses of two members who paid such dues for the purpose of obtaining business.

In addition, we believe that the Treasury Department was fully cognizant in 1929, when Petitioner's Articles of Incorporation were amended [Resp. Br. p. 5 and R. 227-228], that passenger cars might be put to commercial use and were so being used. In any event, it was the policy of the Government at that time to allow exemption of automobile clubs generally [see Petitioner's Brief in Support of Petition for Certiorari p. 14, and R. 106-107], in spite of the fact that obviously there must have been wide variations and occasional changes both in Articles of Incorporation and By-Laws of such clubs.

See also:

I. T. 2296, V-2 C. B. 65;

S. M. 5516, V-1 C. B. 81;

Pasadena Methodist Foundation, 2 T. C. M. 905;

Orton Ceramics Foundation v. Commissioner, 9 T. C. 533.

Respondent appears to be clearly in error in stating on page 9 of his brief that "No bona fide dispute exists as to the nature of the California State Automobile Association or its activities * * *" On the contrary, such a dispute does exist and forms the issue in the present case. Also, for example, Respondent contends that the Association is not a club and appears to question, as indicated on page 8 of his brief, whether or not there were members. Not only has the District Court found that the Association is a club, but the fact that it has members is referred to in numerous findings of that Court [R. 82-89]. We consequently believe that Respondent is quite in error in asserting that Petitioner's contention in its Petition for Certiorari and Brief in Support Thereof that the Court of Appeals failed to give effect to Rule 52(a) of the Rules of Civil Procedure is without merit.

Strange, indeed, is the argument of Respondent on pages 9 and 10 of his brief that Petitioner's contention that the Court of Appeals was bound to give effect to early *informal administrative rulings* is without merit. Respondent says that such rulings lack the dignity and effect of Treasury Regulations, etc. Petitioner's argument in its Petition for Certiorari and Brief in Support Thereof in this connection is made on pages 16 to 19 and makes no reference whatever to "informal administrative rulings." On the contrary, Petitioner's contention was there stated to be that for a period of thirty (30) years from 1913 to 1943, the Commissioner of Internal Revenue had exempted Petitioner from the payment of any income tax under an administrative construction repeated again and again with no material change in a number of successive *Regulations* issued under various Revenue Acts, and finally

under the codification of such Acts in the Internal Revenue Code.

The reference there plainly is to Treasury Regulations, prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. Such Regulations, to which Petitioner referred, are of the highest dignity and standing within the Treasury Department in the interpretation of the tax laws. It was to these authoritative *Regulations,* and not to mere *informal administrative rulings,* to which reference was made by Petitioner, as above stated; and the rule relied upon by Petitioner, as set forth in its Petition and Brief, is one established by this Court, viz., that such administrative construction of a provision of a tax statute acquires the force of law by virtue of subsequent reenactments by Congress of such provision. Several decisions of this Court stating such rule were cited in our Brief at pages 17 and 18.

Respondent then cites G. C. M. 23688, 1943 Cum. Bull. 283. It is pertinent here to point out that a G. C. M.—General Counsel's Memorandum—is inferior in standing and authority to Treasury Regulations. As the basis for an adverse decision against Petitioner, G. C. M. 23688 signally fails for a number of reasons. In the first place, the "M Association," which is the subject of that Memorandum, is obviously a nationwide federation of automobile clubs, as it is stated therein that the Association functions to a large extent as a "federation of automobile clubs" and as "the managing agency of several local automobile clubs" [R. 45-47, 107, 217, 220-221, and quoted in part on pages 15-21 of Respondent's Brief.] In addition, in the said Memorandum we find that "individuals

who are, or become, affiliated with this corporation *shall not be members,* but shall be classed as regular and honorary associates * * *" (italics supplied).

The M Association is wholly unlike Petitioner as the latter, whose functions are set forth at length in the Record, does not function as a federation of automobile clubs or as a managing agency of local automobile clubs, nor does it conduct or participate in any such functions. Likewise, Petitioner has no member clubs. [R. 181-182.]

Petitioner is sharply distinguished from the M Association, also, in that it bears no resemblance whatsoever to the organization described in G. C. M. 23688 where "Arrangements have also been made with certain merchants in one area whereby members of one of the local organizations may purchase clothing, laundry, furniture, and automobile supplies at less than the usual selling prices of such articles." Petitioner does none of these things. [R. 175.]

Another difference between Petitioner and the M Association is that, in the latter, individual members have no right to vote in the affairs of the corporation, whereas in Petitioner, the individual members have such rights and the Record shows they do vote and otherwise actively participate in the affairs of the corporation. [R. 179-181.]

Again, there is a radical difference between Petitioner and the M Association, which latter is stated in G. C. M. 23688 to operate "in the nature of a non-profit cooperative

buying association," as Petitioner engages in no such activities whatever. [R. 173-174.]

A careful comparison of the activities and operations of Petitioner and the M Association shows the former to be widely divergent from the latter in practically every respect.

Respondent refers to G. C. M. 23688, *supra,* as being characterized in 6 Mertens, Law of Federal Income Taxation, Section 34.30, page 63, as an extended and well considered opinion. It is enlightening in that connection to quote further from the same Section 34.30 where, after quoting the Treasury Regulations under Section 101(9) of the Code, Mertens says:

> "Exemption is not given under this section to a club which is an association of clubs and *has no individual members.*
>
> "Illustrations of social clubs granted exemption are numerous. Exemption has been granted to clubs formed for the purpose of (1) providing for members a meeting place and dining room, (2) promoting the principles and interests of a certain political party, (3) college fraternities, (4) *automobile clubs organized to promote good roads, such clubs having been declared to be exempt even though an organization incidental to the main purposes of the club publishes a revenue-producing magazine, or the club places insurance for members, and receives commission for such work,* and (5) clubs organized to facilitate greater use of mountains. * * *" (Italics supplied.)

In a footnote on said page 63, Mertens, referring to G. C. M. 23688, *supra,* comments that "In a prior ruling (G. C. M. 3555, C. B. VII-1, p. 117 (1928)) the same association had been held to be exempted under Sec. 231 (9) of the Revenue Act of 1926, which is a corresponding provision to Sec. 101(9) of the Code, but at the time of that ruling the association had *individual* as well as club members. In 1941 the by-laws of the association were changed to *exclude* individual members." (Italics supplied.)

It is quite obvious, therefore, that one of the principal reasons why the M Association lost its tax exemption was because the by-laws in 1941 were changed to exclude individual members.

Respondent, in his Brief, finally urges that the Regulations, while not dealing specifically with automobile associations, fully support the Collector's position here. In answer to that argument, attention is again invited to the fact that under essentially identical Regulations from 1916 to 1943, the very Regulations relied upon by Respondent and appearing in the Appendix to his brief on pages 12 to 15, the Commissioner of Internal Revenue, without interruption, and actually from 1913 on, had granted exemption to Petitioner itself, as well as to automobile clubs in general. [R. 106, 107, 155.] At the time such exemption was withdrawn from Petitioner there had been no change either in the law or the Regulations.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari herein should be granted and that the decision of the United States Court of Appeals for the Ninth Circuit should be reviewed and finally reversed by this Honorable Court.

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December, 1949.

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No. 444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

CALIFORNIA STATE AUTOMOBILE ASSOCIATION,
Petitioner,

vs.

JAMES G. SMYTH, Collector of Internal Revenue of the First Internal Revenue Collection District of California,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE

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October, 1949

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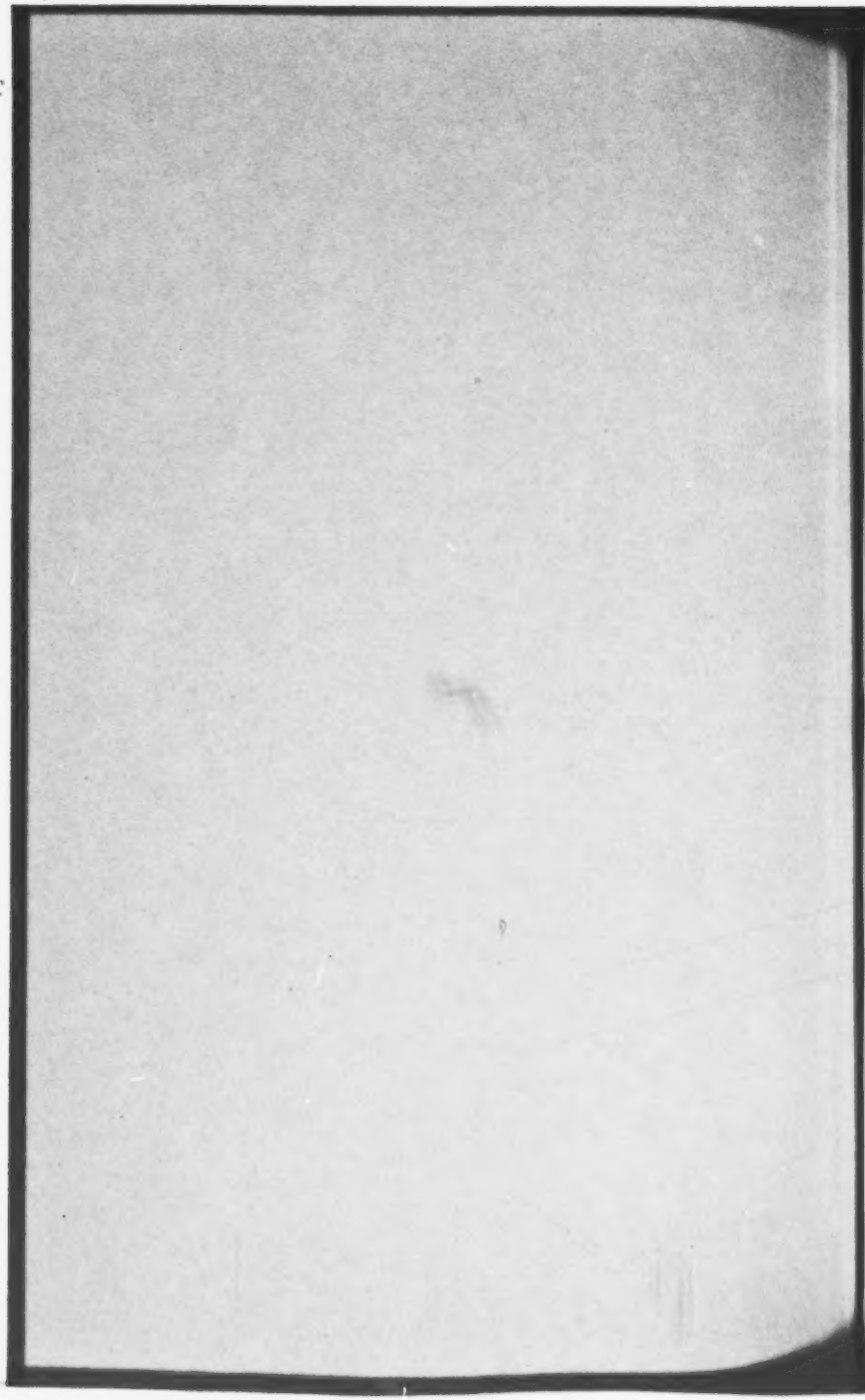

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BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Amicus curiae filing this brief is the Automobile Club of Washington, a corporation organized under the laws of the State of Washington authorizing the formation of corporations not formed for profit, which is similar in organization and operation to the petitioner. The final disposition of the present case will have an important bearing upon the Federal income and excess profits tax liability of the Automobile Club of Washington and upon the disposition of the case of *Automobile Club of Washington v. United States,* now pending in the United States District Court for the Western District of Washington, Northern Division, instituted for the purpose of recovering refunds of income and

excess profits taxes paid by the Automobile Club of Washington.

SUMMARY OF ARGUMENT

The question of exemption from Federal income and excess profits taxes of Automobile Clubs necessarily involves a construction of provisions of the Internal Revenue Code which have a common application to practically all Automobile Clubs, including the Automobile Club of Washington. Therefore, this Court may appropriately grant the petition for certiorari for the purpose of hearing and resolving a legal issue of general interest.

ARGUMENT

The petition for certiorari correctly states that the Court of Appeals for the Ninth Circuit has, in this case, decided an important question of Federal law which has never been settled by this Court. That question is whether clubs organized and operated for many years as has been the petitioner are exempt from Federal income and excess profits taxes under Section 101(9) of the Internal Revenue Code, relating to clubs organized and operated exclusively for pleasure, recreation and other nonprofitable purposes.

The Automobile Club of Washington, like the petitioner, has been organized and operated as an automobile club for more than thirty years and, until 1943 had at all times been recognized by the Bureau of Internal Revenue as a club exempt from Federal income and excess profits

taxes under Section 101(9). Although there are some differences in the details of the activities carried on by petitioner during the years 1943 and 1944 and those carried on by the Automobile Club of Washington, basically they are so similar that a determination by this Court with respect to petitioner would probably be controlling with respect to the Automobile Club of Washington. Moreover, based upon an examination made of the organization and operation of other automobile clubs in the United States, of which there are a very great many, it is believed that they, likewise, would probably be controlled by a decision in this case with respect to exemption from Federal taxes.

For the reasons stated in the petition for certiorari we believe that the decision of the Court of Appeals for the Ninth Circuit in this case is in conflict with decisions of this Court and with the Rules of Civil Procedure for the District Courts of the United States. Specifically, we believe that the Court of Appeals failed to give proper weight to the decisions of this Court in *Helvering v. Bliss,* 293 U.S. 144 (1935) and *Helvering v. Griffiths,* 318 U.S. 371 (1943) which with clarity and emphasis reaffirmed the proposition that the re-enactment of a taxing statute by Congress, year after year, without change, in the face of a consistent and widespread interpretation and application of the statute by the Commissioner of Internal Revenue in a given manner is compelling evidence of the intention of Congress with respect to the scope and effect of the statute.

The decision of the Court of Appeals also fails to give effect to Rule 52(a) of the Rules of Civil Procedure for the District Courts of the United States which requires Appellate Courts to accept the findings of the Trial Court to the extent that there is testimony in the record consistent with the findings. In the present case the District Court found that the petitioner was a club and that it was organized and operated exclusively for pleasure, recreation and other nonprofitable purposes, and that no part of the net earnings inured to the benefit of any private shareholder. The testimony in the case amply supported that finding and the Court of Appeals committed error in refusing to accept it.

To defer the resolving of these apparent conflicts until additional cases have been decided involving the exempt status of other automobile clubs operating within the jurisdiction of other Courts of Appeals for other circuits will, we believe, serve no good purpose and will only result in much inconvenience and hardship for all of the automobile clubs affected by the decision of the Court of Appeals in the present case, including the Automobile Club of Washington which presently has pending in the United States District Court for the Western District of Washington, Northern Division, an action entitled *Automobile Club of Washington v. United States* presenting the same basic problem of exempt status for Federal tax purposes and which is

being held in suspense upon the Court's docket, without trial, awaiting final determination of the present case.

CONCLUSION

This Court should grant the petition for certiorari herein.

Respectfully submitted,

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